

LEXSEE

ROBERT EGGART, individually and on behalf of himself and all other Washington residents and entities similarly situated, Plaintiff, v. "A.L.S. ENTERPRISES, INC., et al., Defendants.

No. CV-09-0107-FVS

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
WASHINGTON**

2009 U.S. Dist. LEXIS 51886

**June 2, 2009, Decided
June 2, 2009, Filed**

COUNSEL: [*1] For Robert Eggart, individually and on behalf of himself and all other Washington residents and entities similarly situated, Plaintiff: Anthony Darrow Shapiro, LEAD ATTORNEY, Hagens Berman LLP, Seattle, WA.

For ALS Enterprises Inc, Cabela's Incorporated, Cabela's Wholesale Inc, Gander Mountain Co, Bass Pro Shops Inc, Defendants: Andrew G Yates, Lane Powell PC, Seattle, WA; Gwendolyn Cecilia Payton, Lane Powell PC - SEA, Seattle, WA.

For Browning Inc, Defendant: Molly A Malouf, Corr Cronin Michelson, Baumgardner & Preece LLP, Seattle, WA.

JUDGES: Fred Van Sickle, Senior United States District Judge.

OPINION BY: Fred Van Sickle

OPINION

ORDER

THIS MATTER came before the Court on Defendants' unopposed motion to stay all currently pending deadlines in this action until after a decision by the Joint Panel on Multidistrict Litigation ("JPML") on the pending motions seeking transfer to a single federal court of all related cases filed in federal courts nationwide. (Ct. Rec. 30). Plaintiff is represented by Anthony Darrow Shapiro. Defendants A.L.S. Enterprises Inc., Cabela's Wholesale Inc., Gander Mountain Co., and Bass Pro Shops Inc. are represented by Andrew G. Yates and Gwendolyn Cecilia Payton. Defendant Browning Inc. is [*2] represented by Molly A. Malouf.

BACKGROUND

On April 9, 2009, Plaintiff filed the instant class action against Defendants alleging claims for violation of Washington's Consumer Protection Act, unjust enrichment and civil conspiracy. (Ct. Rec. 1). Multiple actions alleging similar claims have been filed in other district courts around the country, and all plaintiffs in these cases are represented by the same lead counsel who also represents Plaintiff in this case.

On March 28, 2009, Plaintiffs in these actions filed a motion before the JPML seeking transfer for coordination or consolidation to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1407(a). Plaintiffs' motion was scheduled for hearing by the JPML on May 28, 2009. In light of the pending transfer motion, Defendants request that the Court stay this action pending the JPML's decision. (Ct. Rec. 30). Defendants assert that the granting of a stay for a short period of time to permit the JPML to rule would impose no prejudice on Plaintiff, and, because this Court may lose jurisdiction over this case if the JPML ultimately determines that a transfer is warranted, a stay achieves the purposes [*3] of 28 U.S.C. § 1407 - - the promotion of the just and efficient administration of litigation. (Ct. Rec. 31). Plaintiff does not oppose Defendants' motion to stay this action.

RULING

Granting a brief stay, pending the JPML's decision, will not result in prejudice to Plaintiff and will further the policies of judicial economy, efficiency and consistency. A stay ensures that there is consistent treatment of numerous lawsuits and that judicial resources are not wasted. Therefore, the Court finds that good cause exists

for granting a stay of this action pending a decision by the JPML regarding a transfer to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1407(a).

Accordingly, **IT IS HEREBY ORDERED as follows:**

1. Defendants' motion to stay (Ct. Rec. 30) is **GRANTED**.

2. This action, including Defendants' pending motion to dismiss (Ct. Rec. 9), is **STAYED** pending a decision by the JPML.

3. The June 24, 2009, hearing date on the pending motion to dismiss is **VACATED**.

4. The parties shall keep this Court apprised of the JPML proceedings, and, based upon what transpires, Defendants may re-notice their motion, if necessary.

IT IS SO ORDERED. The District Court [*4] Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this *2nd* day of June, 2009.

/s/ Fred Van Sickle

Fred Van Sickle

Senior United States District Judge

LEXSEE



Analysis
As of: Sep 22, 2009

**GYPSY D. GONZALEZ and JOSE M. GONZALEZ, wife and husband, Plaintiffs, -
vs- MERCK & CO., INC., d/b/a Merck, a New Jersey corporation, JAMES E.
LINDSTROM, M.D., an individual, and YAKIMA VALLEY FARM WORKERS
CLINIC, Defendants.**

NO. CV-07-3034-LRS

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
WASHINGTON**

2007 U.S. Dist. LEXIS 56326

**August 2, 2007, Decided
August 2, 2007, Filed**

PRIOR HISTORY: In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 2005 U.S. Dist. LEXIS 2527 (J.P.M.L., 2005)

COUNSEL: [*1] For Gypsy D Gonzalez, wife and husband, Jose M Gonzalez, husband and wife, Plaintiffs: Paul Hamilton Beattie, LEAD ATTORNEY, Law Offices of Paul H. Beattie, Yakima, WA.

For Merck & Co, Inc, a New Jersey corporation doing business as Merck, Defendant: Douglas A Hofmann, Jeffrey Royal Johnson, LEAD ATTORNEYS, Williams Kastner & Gibbs - SEA, Seattle, WA.

For James E Lindstrom, MD, an individual, Yakima Valley Farm Workers Clinic, Defendants: David A Thorner, LEAD ATTORNEY, Thorner Kennedy & Gano PS, Yakima, WA.

JUDGES: Lonny R. Suko, United States District Judge.

OPINION BY: Lonny R. Suko

OPINION

ORDER DISMISSING CLAIMS AGAINST DEFENDANTS LINDSTROM AND YAKIMA VALLEY FARM WORKERS CLINIC AND STAYING CASE

BEFORE THE COURT is Defendant Merck & Co., Inc.'s [Merck] Motion to Stay All Proceedings Pending a

Decision on Transfer by the Judicial Panel on Multidistrict Litigation, Ct. Rec. 10, filed June 21, 2007; and Defendants James E. Lindstrom, M.D.'s and Yakima Valley Farm Workers Clinic's Motion for Judgment on the Pleadings in Favor of Defendants Lindstrom and Yakima Valley Farm Workers Clinic, Ct. Rec. 18, filed June 29, 2007. The motions were noted for July 23, 2007 without oral argument.

A. Background

Multidistrict litigation [*2] proceedings, which this case is part of, have been established in the Eastern District of Louisiana to coordinate all federal product liability actions involving Vioxx, In re Vioxx Prods. Liab. Litig., 360 F.Supp.2d 1352 (J.P.M.L. 2005). On June 5, 2007 Defendant Merck removed this action from Yakima County Superior Court to this Court based on diversity jurisdiction under 28 U.S.C. § 1332. On June 8, 2007, Merck provided notice to the Judicial Panel on Multidistrict Litigation [MDL Panel] of the pendency of this "tag-along" action pursuant to Rule 7.5(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. On July 12, 2007, the Court received a letter from the Chairman of the MDL Panel indicating that a notice of opposition to the Panel's conditional transfer order in this matter was presently before the Panel pursuant to 28 U.S.C. § 1407. The letter additionally indicated that jurisdiction continued with this Court until any transfer ruling became effective. The letter also invited this Court

to rule on any pending motions before it. This Court has chosen to rule on Defendants Lindstrom and Yakima Valley Farm Workers Clinic's [Defendants] motion for judgment [*3] on the pleadings pursuant to Fed.R.Civ.P. 12(c) and RCW 7.70.150 and Defendant Merck's motion to stay proceedings.

B. Defendants' FRCP 12(c) Motion

Defendants request the Court to dismiss the case against them based on Plaintiffs' failure to file a certificate of merit that complies with RCW § 7.70.150(5)(a). Plaintiffs concede that they did not comply with all procedural requirements but urge that a dismissal without prejudice is the appropriate remedy rather than a dismissal with prejudice. Plaintiffs argue that a dismissal with prejudice is a harsh result and not favored by courts.

Defendants reply that they are seeking a dismissal of the case against Defendants Lindstrom and Yakima Valley Farm Workers Clinic only and such dismissal is not intended to be with prejudice or a judgment on the merits. Defendants state that the Court should simply dismiss the action pending against these two defendants pursuant to Fed.R.Civ.P. 12(c).

Indeed RCW 7.70.150(5)(a) reads:

(5) (a) Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.

It is undisputed that Plaintiffs did not file a certificate of merit as required by RCW 7.70.150.

A [*4] Rule 12(c) motion provides a vehicle for summary adjudication on the merits, after the pleadings are closed but before trial, which may save the parties needless and often considerable time and expense which otherwise would be incurred during discovery and trial. Fed. R. Civ. Pro. 12(c); Alexander v. City of Chicago, 994 F.2d 333, 336 (7th Cir. 1993). Generally, this means that a Rule 12(c) motion must await the answers of all defendants. Moran v. Peralta Community College Dist., 825 F.Supp. 891, 893 (N.D.Cal.1993). A pleading's legal conclusions and inferences will not be deemed admitted, Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 452 (7th Cir.1998), but Rule 12(c) judgment will be granted if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law. Fajardo v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir.1999).

Rule 12(c) may be employed as a vehicle for raising several of the defenses enumerated in Rule 12(b), including the defense of failure to state a claim upon which

relief may be granted. See 5 Wright & Miller, Federal Practice and Procedure: Civil s 1367. Dismissal may be based on either the lack of a cognizable [*5] legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990). Judgment on the pleadings is only warranted where it appears beyond doubt that the plaintiff will be unable to prove any facts to support the alleged claims for relief. Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir.2002).

In this case, as all Defendants have answered Plaintiffs' Complaint, the Court finds that Defendants' Rule 12(c) motion is timely. RCW 7.70.150 does not provide the Court with guidance on the type of dismissal that it contemplates. "Courts have discretion to grant leave to amend in conjunction with 12(c) motions, and may dismiss causes of action rather than grant judgment." Moran, 825 F.Supp. at 893 (citing Amersbach v. City of Cleveland, 598 F.2d 1033, 1038 (6th Cir. 1979)).

The mere fact that this motion is couched in terms of a motion for judgment on the pleadings does not prevent the Court from disposing of the motion by dismissal rather than by judgment. Therefore, the claims against Defendants Lindstrom and Yakima Valley Farm Workers Clinic are dismissed without prejudice.

C. Defendant [*6] Merck's Motion to Stay

Defendant Merck requests a stay of all proceedings pending a decision on the transfer by the MDL panel. Defendant Merck argues that judicial economy mandates a stay of this matter and that absent a stay, Merck will be prejudiced.

The other parties to this action have not opposed Defendant Merck's motion to stay. The Court agrees with Defendant Merck and well settled case law that dictates a stay should be granted to promote judicial economy.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants James E. Lindstrom, M.D.'s and Yakima Valley Farm Workers Clinic's Motion for Judgment on the Pleadings in Favor of Defendants Lindstrom and Yakima Valley Farm Workers Clinic, **Ct. Rec. 18**, filed June 29, 2007 is **GRANTED**. The claims against Defendants Lindstrom and Yakima Valley farm Workers Clinic are **DISMISSED without prejudice**.

2. Defendant Merck & Co., Inc.'s Motion to Stay All Proceedings Pending a Decision on Transfer by the Judicial Panel on Multidistrict Litigation, **Ct. Rec. 10**, filed June 21, 2007 is **GRANTED**. This case is **STAYED** pending a decision from the MDL Panel.

The District Court Executive is directed to file this
Order and provide copies to counsel.

DATED this 2nd [*7] day of August, 2007.

s/Lonny R. Suko

United States District Judge

LEXSEE



Analysis
As of: Sep 22, 2009

TISHA S. TENCH, individually and on behalf of all others similarly situated, Plaintiff v. JACKSON NATIONAL LIFE INSURANCE COMPANY and BROOKE LIFE INSURANCE Company, Defendants.

No. 99 C 5182

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U.S. Dist. LEXIS 18023

**November 10, 1999, Decided
November 12, 1999, Docketed**

DISPOSITION: [*1] Defendants' motion to stay GRANTED until MDL Panel decides whether to transfer this case to consolidated proceedings.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant insurance company moved for a stay in plaintiff's class action lawsuit pending likely transfer of the case by the Judicial Panel for Multidistrict Litigation. The complaint alleged fraud, misrepresentation, breach of contract, breach of fiduciary duty, and state law violations resulting from sales of vanishing premium life insurance policies.

OVERVIEW: Defendant insurance company moved for a stay in plaintiff's class action lawsuit pending likely transfer of the case by the Judicial Panel for Multidistrict Litigation. The complaint alleged fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violations of the state consumer fraud acts, resulting from sales of vanishing premium life insurance policies. Defendant had removed the case from the state court, and plaintiff sought to have it remanded based on the amount in controversy. The court held that since this was one of many similar actions filed throughout the country and four were already pending in another district, the case would likely be transferred; the judge familiar with such cases could better calculate the amount in controversy and remand if jurisdiction was in fact lacking. Because the Multidistrict Litigation Panel would meet in

one week, plaintiff would not be prejudiced by a brief stay, and defendants' motion was granted.

OUTCOME: Defendants' motion for a stay until the Multidistrict Litigation Panel decided whether to transfer this case to consolidated proceedings in another district was granted, because that course would best serve judicial economy and avoid conflicting pretrial rulings.

LexisNexis(R) Headnotes

***Civil Procedure > Venue > Multidistrict Litigation
Civil Procedure > Pretrial Matters > Consolidation of Actions***

[HN1]To further judicial economy and eliminate the potential for conflicting pretrial rulings, federal law permits the transfer of cases pending in different districts involving common questions of fact to the same district for consolidated pretrial proceedings. 28 U.S.C.S. § 1407(a).

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy
Civil Procedure > Class Actions > Class Counsel > Fees
Civil Procedure > Remedies > Damages > Punitive Damages***

[HN2]Calculation of the amount in controversy in a class action is no simple task, and is determined by aggregating the plaintiff's compensatory damages along with the plaintiff's pro rata share of attorneys fees, punitive damages, and the cost of injunctive relief to the defendant.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Amount in Controversy

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN3]The amount in controversy in a class action lawsuit is most efficiently decided by a court that has managed similar proceedings with common issues of law and fact.

COUNSEL: For TISHA S TENCH, plaintiff: Marvin Alan Miller, Adam J. Levitt, Miller, Faucher, Cafferty and Wexler, L.L.P., Chicago, IL.

For TISHA S TENCH, plaintiff: Andrew S Friedman, Frank J Balint, Jr, Bonnett, Fairbourn, Friedman & Balint, P.C., Phoenix, AZ.

For TISHA S TENCH, plaintiff: Howard D Finkelstein, Mark L Knutson, Finkelstein & Krinsk, San Diego, CA.

For JACKSON NATIONAL LIFE INSURANCE COMPANY, BROOKE LIFE INSURANCE COMPANY, defendants: James A. Rolfes, Sachnoff & Weaver, Ltd., Chicago, IL.

JUDGES: Elaine E. Bucklo, United States District Judge.

OPINION BY: Elaine E. Bucklo

OPINION

MEMORANDUM OPINION AND ORDER

Tisha Tench, an Illinois citizen, filed a class action lawsuit on July 2, 1999, in the Circuit Court of Cook County, Illinois against defendants Jackson National Life Insurance Company and Brooke Life Insurance Company ("Jackson National") in connection with its marketing and sale of a life insurance policy referred to as a "vanishing premium" policy. Ms. Tench alleges that Jackson National is liable for (1) violation of the Illinois Consumer [*2] Fraud and Deceptive Business Practices Act and Uniform Deceptive Trade Practices Act, (2) negligent misrepresentation, (3) common law fraud, (4) breach of contract, and (5) breach of fiduciary duty.

On August 9, 1999, Jackson National removed Ms. Tench's case to federal court pursuant to 28 U.S.C. §

1441. The parties agree that diversity of citizenship exists but dispute whether the amount in controversy meets the \$ 75,000 requirement of diversity subject matter jurisdiction. Thus, Ms. Tench filed a motion to remand for lack of subject matter jurisdiction.

This case is one of many filed throughout the country based on the marketing and sale by life insurers of the so-called "vanishing premium" policies. The Judicial Panel for Multidistrict Litigation (the "MDL Panel") has, to date, consolidated four cases filed against Jackson National before the Honorable David McKeague of the United States District Court for the Western District of Michigan. The MDL Panel has set this case for hearing on November 19, 1999 on the issue of consolidation, and a transfer decision on another case is also pending. Jackson National has filed a motion to stay all proceedings pending [*3] the decision of the MDL Panel.

[HN1]To further judicial economy and eliminate the potential for conflicting pretrial rulings, federal law permits the transfer of cases pending in different districts involving common questions of fact to the same district for consolidated pretrial proceedings. 28 U.S.C. § 1407(a). The MDL Panel is likely to transfer the case at bar, since it involves a nearly identical set of facts and similar legal theories as the cases previously consolidated before Judge McKeague. Under these circumstances, i.e. pending a decision by the MDL Panel whether to add a case, stays are frequently granted to avoid duplicative efforts and preserve valuable judicial resources.

The MDL Panel clearly has the authority to transfer this case despite Ms. Tench's jurisdictional objection. See, e.g., *In re Ivy*, 901 F.2d 7, 8-10 (2d Cir. 1990)("Once transferred, the jurisdictional objections can be heard and resolved by a single court and reviewed at the appellate level in due course."); *In re Federal Election Campaign Act Litigation*, 511 F. Supp. 821, 823-24 (J.P.M.L. 1979) (panel transferred actions despite pendency of motions [*4] to dismiss for lack of subject matter jurisdiction). Indeed, as a court in this district has recognized, the benefits of transferring such cases "to the MDL--the body established by Congress specifically to ameliorate the duplicative litigation and the valuable waste of judicial resources--are obvious" *Johnson v. AMR Corp.*, 1996 U.S. Dist. LEXIS 4172, 1996 WL 164415 (N.D. Ill. 1996).

Ms. Tench's proffer of snippets from an unrelated letter from the MDL Panel regarding a different case entirely is not an indication that the MDL Panel wants me to decide this issue immediately. Judge McKeague has been involved with the consolidated proceedings for over three years and is intimately familiar with many of the key facts which must be considered in a jurisdictional

analysis. His experience will inform the question of jurisdiction and should not be wasted. ¹ This issue may arise again in other actions against Jackson National, so resolution by Judge McKeague in a single forum will ensure consistency and avoid duplicative efforts.

1 In this Circuit, [HN2]calculation of the amount in controversy in a class action is no simple task, and is determined by aggregating the plaintiff's compensatory damages along with the plaintiff's pro rata share of attorneys fees, punitive damages, and the cost of injunctive relief to the defendant. *In re Brand Name Prescription Drugs*, 123 F.3d 599 (7th Cir. 1997). Judge McKeague has more experience with the factual issues, including potential class size and valuation of the "vanishing premium" policies. [HN3]The amount in controversy is most efficiently decided by the court who has managed similar proceedings with common issues of law and fact for over three years.

[*5] Since the MDL Panel will hear argument on this issue only a week from now, there will be no prejudice to Ms. Tench from undue delay nor will she be denied the opportunity to be heard on the issue of subject matter jurisdiction. A stay would be for only the limited period until the MDL Panel decides whether to consolidate the instant action, then Ms. Tench may proceed with all of her desired motions. A stay is therefore the most appropriate option pending a final decision on transfer by the MDL Panel.

The defendants' motion to stay is GRANTED until the MDL Panel decides whether to transfer this case to the consolidated proceedings.

ENTER ORDER:

Elaine E. Bucklo

United States District Judge

Dated: November 10, 1999

LEXSEE



Analysis

As of: Sep 22, 2009

SPENCER A. JOHNSON, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. RONALD LEWIS, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. DONALD MERKEL, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. MICHAEL A. PARKER, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. CHERYL L. PETERS, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants. ANN STELLATO, et al., Plaintiffs, v. AMR CORPORATION, et al., Defendants.

Case No.: 95 C 7659, Case No.: 95 C 7660, Case No.: 95 C 7661, Case No.: 95 C 7662, Case No.: 95 C 7663, Case No. 95 C 7664

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1996 U.S. Dist. LEXIS 4172

April 1, 1996, Date
April 3, 1996, DOCKETED

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff survivors and the estates of deceased passengers brought wrongful death suits against defendant corporation, and others, arising from an airplane crash. Defendants claimed that plaintiffs' fraudulent joinder of them necessitated removal to state court.

OVERVIEW: Many of the suits were filed in state court, rather than in federal court, because one of the named defendants was a citizen of Illinois with Illinois also as its principal place of business. The other defendants were Delaware corporations with their principal place of business in Texas. The presence among defendants of the Illinois citizen for diversity purposes affected the forum where the cases could be heard. The parties argued that two judicial bodies, the Executive Committee and the Judicial Panel on Multidistrict Litigation (MDL), had a crucial stake in the proceedings. Plaintiffs urged the court to send the cases back to a particular judge or to the Executive Committee. Defendants urged that the cases should be sent to the MDL. The MDL issued a conditional transfer order transferring to a judge in the Middle District of North Carolina those

cases involving common questions of fact concerning the cause or causes of the crash at issue. The court found that sending the cases to the MDL was not mandatory, but it concluded that the benefits of transferring them to the MDL were obvious.

OUTCOME: The court stayed any ruling on all pending motions until the panel ruled on the transfer issue.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Amount in Controversy > Determinations

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > Business Entities

[HN1]In those cases not presenting federal questions under 28 U.S.C.S. § 1331(a), a district judge has jurisdiction only over matters in controversy exceeding the value of \$ 50,000 between "citizens of different States." 28 U.S.C.S. § 1332(a)(1).

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

[HN2]Jurisdictio est potestas de publico introducta cum necessitate juris dicendi. That is, jurisdictionnn is a power introduced for the public good, on account of the necessity of dispensing justice. Within the federal courts, jurisdictionnn is a concept of fundamental concern. It is a question which a court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Parties > Joinder > Fraudulent Joinder

Civil Procedure > Parties > Joinder > Misjoinder

[HN3]Congress has taken specific measures to assure that the jurisdictionnnal power of the federal court system is not squandered on cases that do not satisfy the specified requirements. The law looks askance at those who would subvert the intent of Congress by naming as defendants nominal parties with no discernible relationship to the cause of action. This attempt to destroy a federal court's diversity jurisdictionnn, and defendants' right to removal, by suing non-diverse parties actually has its own name: "fraudulent joinder."

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > Parties > Joinder > Fraudulent Joinder

Civil Procedure > Parties > Joinder > Misjoinder

[HN4]In matters concerning jurisdictionnn, "fraudulent" is a term of art for a set of circumstances that preclude plaintiffs from any reasonable possibility of winning their claim in state courts. Federal court must engage in an action of prediction about the chances of plaintiffs' success. If defendants fail to meet their heavy burden of proving there is not any reasonable possibility of plaintiffs' winning, they have not proved fraudulent joinder, and the case must be remanded back to state court for want of diversity.

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview

[HN5]A federal court must decline jurisdictionnn over cases or controversies where the defendants and plaintiffs share the same citizenship. 28 U.S.C.S. § 1332(a)(1).

COUNSEL: [*1] For SPENCER A JOHNSON est Scott A Johnson, THOMAS J KESSINGER est Scott A Johnson, executor plaintiffs (95-CV-7659): Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio,

[COR], David Casey Wise, [COR] Corboy & Demetrio, Chicago, IL. For RONALD LEWIS, DIANE R LEWIS, plaintiffs (95-CV-7660): Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR], Corboy & Demetrio, Chicago, IL. For DONALD MERKLE, LOSI MERKEL, plaintiffs (95-CV-7661): Peter C. John, [COR LD NTC A], Matthew Michael Getter, [COR], Hedlund, Hanley & John, Chicago, IL. For MICHAEL A PARKER, Individually est David M Parker, Jr, executor plaintiff (95-CV-7662): Philip H. Corboy, [NTC], Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR] Corboy & Demetrio, Chicago, IL. For CHERLY L PETERS, as special administrator est William J Peters, plaintiff (95-CV-7663): Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR], Corboy & Demetrio, Chicago, IL. For ANN STELLATO est Salvatore Stellato, executor plaintiff (95-CV-7664): Philip H. Corboy, [NTC], Thomas A. Demetrio, [COR LD NTC A], Michael Kelly Demetrio, [COR], David Casey Wise, [COR], Corboy & Demetrio, Chicago, IL.

For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7659): Charles William Douglas, [COR LD NTC A], Sidley & Austin, Chicago, IL. Sara J. Gourley, [COR], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7659): Michael Gerard McQuillen, [COR LD NTC], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7659): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., a corporation, FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7660): Charles William Douglas, [COR LD NTC A], Sidley & Austin, Chicago, IL. Sara J. Gourley, [NTC], Sheila Ann Sundvall, [NTC], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL INC., a corporation, defendant (95-CV-7660): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7660): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corp., AMR EAGLE, INC., a corp., FLAGSHIP AIRLINES, INC., a corp., FLAGSHIP AIRLINES, INC., a corp., defendants (95-CV-7661): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sund-

vall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corp., defendant (95-CV-7661): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. Michael Gerard McQuillen, [COR], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corp., defendant (95-CV-7661): Michael H. West, [COR], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7662): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7662): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7662): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., a corporation, FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7663): Charles William Douglas, [COR LD NTC A], Sidley & Austin, Chicago, IL. Sara J. Gourley, [COR], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7663): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7663): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL. For AMR CORPORATION, AMERICAN AIRLINES, INC., a corporation, AMR EAGLE, INC., a corporation, FLAGSHIP AIRLINES, INC., a corporation, defendants (95-CV-7664): Sara J. Gourley, [COR LD NTC A], Sheila Ann Sundvall, [COR], Sidley & Austin, Chicago, IL. For ALLIEDSIGNAL ENGINES, INC., a corporation, defendant (95-CV-7664): Michael Gerard McQuillen, [COR LD NTC A], Mark Samuel Susina, [COR], Adler, Murphy & McQuillen, Chicago, IL. For WOODWARD GOVERNOR COMPANY, a corporation, defendant (95-CV-7664): Michael H. West, [COR LD NTC A], Michael Joseph Clarizio, [COR], Burke, Weaver & Prell, Chicago, IL.

JUDGES: James B. Zagel, United States District Judge

OPINION BY: James B. Zagel

OPINION

MEMORANDUM OPINION AND ORDER

The little black box that survived the impact of the crash in Durham, North Carolina on 13 December 1995 records for posterity the last sounds from the last seconds of American Eagle Flight 3379:

1833:33.3

HOT-1 why's that ignition light on? we just had a flame out?

1833:38.4

HOT-2 I'm not sure what's goin' on with it.

1833:39.8

HOT-1 we had a flame out.

1833:40.7

CAM [low frequency beat sound similar to propellers rotating out of synchronization starts and continues for approximately eight seconds]

1833:41.4

HOT-2 'K, you got it?

1833:42.5

HOT-1 yeah.

1833:42.8

HOT-2 we lose an engine?

1833:43.6

HOT-1 OK, yeah.

1833:45.2

HOT-1 OK,uh...

1833:46.0

HOT-2 I'm gonna turn that...

1833:46.5

HOT-1 see if that, turn on the auto...

1833:48.2

HOT-2 I'm goin' to turn on, both uh...ignitions, OK?

1833:51.5

HOT-1 OK.

1833:54.2

HOT-2 we lose that en' left one?

1833:55.9

HOT-1 yeah.

1833:58.9 watta you want me to do you gonna continue?

...

1834:03.7

CAM [low frequency beat sound similar [*2] to propellers rotating out of synchronization starts and continues for approximately three seconds]

...

1834:05.3

CAM [sound similar to single stall warning horn starts and continues for 0.7 seconds]

...

1834:09.8

HOT-2 you got it?

1834:10.8

HOT-1 yeah.

1834:12.2

HOT-2 lower the nose.

1834:13.0

CAM [unidentified rattling sound]

1834:13.2

HOT-2 it's the wrong, wrong foot, wrong engine*.

1834:14.7

CAM [sound similar to dual stall warning horns stop]

1834:14.8

CAM [low frequency beat sound similar to propellers rotating out of synchronization starts and continues for approximately four seconds]

1834:14.9

CAM [sound similar to single stall warning horn stops]

1834:16.1

CAM [sound similar to dual stall warning horns start]

1834:16.3

HOT-B [sound of heavy breathing]

1834:17.6

CAM [sounds similar to dual stall warning horns stop and single horn continues]

1834:18.2

CAM [sound similar to dual stall warning horns start]

1834:18.9

HOT-2 here.

...

1834:24.4

CAM [sound of impact]

1834:24.6

END OF RECORDING

END OF TRANSCRIPT

End, tragically, of Flight 3379.

[*3] Five people survived both the impact and the ensuing fire which engulfed the Flagship Airlines Jetstream 3201 doing business that day as Flight 3379. Thirteen passengers and two crew members died. Since liability often follows hard upon the heels of tragedy, the incident ignited a spate of wrongful death suits filed by the survivors and the estates of the deceased passengers. Many of these suits were filed in the Cook County Circuit Court, rather than in federal court, because one of the named Defendants--Woodward Governor Company--is a citizen of Illinois with Illinois also as its principal place of business.

The other Defendants--AMR Corporation, Inc; American Airlines, Inc; AMR Eagle, Inc.; Flagship Airlines, Inc.; and Allied Signal Engines, Inc.--are not from Illinois. They are Delaware Corporations with their principal place of business in Texas. The presence among Defendants of Woodward Governor--an Illinois citizen for diversity purposes--affects the forum where these cases may be heard. [HN1]In those cases not presenting federal questions under 28 U.S.C. 1331(a), a district judge has jurisdictionnnn only over matters in controversy exceeding the value of \$ 50,000 between "citizens [*4] of different States." 28 U.S.C. § 1332(a)(1).

[HN2]*Jurisdictio est potestas de publico introducta cum necessitate juris dicendi.* That is, jurisdictionnnn is a power introduced for the public good, on account of the necessity of dispensing justice. Black's Law Dictionary 853 (6th ed. 1990). Within the federal courts, jurisdictionnnn is a concept of fundamental concern. *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884). It is a question which a court "is bound to ask and answer for

itself, even when not otherwise suggested, and without respect to the relation of the parties to it." Id.

[HN3]Congress has taken specific measures to assure that the jurisdictional power of the federal court system is not squandered on cases which do not satisfy the specified requirements. The law looks askance at those who would subvert the intent of Congress "by naming as Defendants nominal parties with no discernible relationship to the cause of action." Id. (citing 14A Wright, Miller & Cooper, Federal Practice & Procedure § 3723, at 342 (1985). This attempt to destroy a federal court's diversity jurisdiction (and Defendants' right to removal) by suing non-diverse [*5] parties actually has its own name: "fraudulent joinder."

Before 1992, the Seventh Circuit had "never before addressed fraudulent joinder." Poulos & A.G.P. v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992). When it finally had occasion to, it explained that [HN4]in matters concerning jurisdiction, "fraudulent" is a "term of art" for a set of circumstances that preclude Plaintiffs from any reasonable possibility of winning their claim in state courts. Id. Federal court "must engage in an action of prediction" about the chances of Plaintiffs' success. If Defendants fail to meet their "heavy burden" of proving there is not "any reasonable possibility" of Plaintiffs' winning, they have not proved fraudulent joinder, and the case must be remanded back to state court for want of diversity.

I am the second judge in the Northern District of Illinois who has heard Defendants plead that Plaintiffs' fraudulent joinder of one of them mandates removal to state court. The first was Judge Ann Claire Williams, my immediate neighbor in district court, who heard them in the summer of 1995. The arguments she heard then were identical to the ones I hear now.

But before Judge Williams or I heard [*6] Defendants plead fraudulent joinder in the Northern District of Illinois, these cases were entrusted to Judge Judith Cohen of the Circuit Court of Cook County. Judge Cohen, however, did not have them for long; Defendants removed the cases to Judge Williams. The Defendants do offer a slightly better case for fraudulent joinder. It would be a very much better case if one could consider the NTSB Final Aircraft Accident Report, but I doubt that one can so consider it. 42 U.S.C. § 761(e).

[HN5]A federal court must decline jurisdiction over cases or controversies where the Defendants and Plaintiffs share the same citizenship. 28 U.S.C. § 1332(a)(1).¹ This is exactly what Judge Williams did; she dismissed the cases for want of complete diversity,² unavoidably lobbing them once again in the direction of Cook County.

1 Moreover, Judge Williams recognized what some would not: in attempting to prove that the engines and propeller governors functioned perfectly on the day of the crash, Defendants mistakenly confused those facts which go to the merits with those facts which establish jurisdiction:

The removing Defendants have missed the fine distinction between considering summary judgment-type evidence (which the court can do) and making a summary judgment-type determination (which it cannot).

[*7]

2 See Judge Williams' Memorandum Opinion and Order of 12 January 1995 at 12-13 ("In sum it is possible that a state court could find Woodward at least partly responsible for this air crash. Since a cause of action against Woodward might be sustained in a state court, there was no fraudulent joinder. Therefore, for the reasons set forth . . . this cause, having been removed improvidently without jurisdiction is remanded to the Circuit Court of Cook County.").

Judge Cohen barely had them in her grasp again when Defendants moved to re-remove the cases back to federal court on 28 December 1995.

I fear that the tenacity of the parties and the nature of the federal diversity requirement have combined to make the judges of both state and federal governments unwilling participants in a game of judicial "Hot Potato," undignified because such goings-on insensitively denigrate the memory of whose loss of life was the catalyst for the present actions.

As if Judge Williams, Judge Cohen, and myself did not offer enough potential forums, the parties now argue that two judicial bodies--The Executive [*8] Committee and the Judicial Panel on Multidistrict Litigation (MDL)--have a crucial stake in the proceedings. Citing procedural irregularities in the re-filing of these cases in District Court,³ Plaintiffs urged me to send these cases back to Judge Williams, or, failing that, to the Executive Committee (who they hope will then send the cases to Judge Williams after an investigation). See Plaintiffs' Emergency Motion for Assignment to the Calendar of the Executive Committee for Refiling and/or Reassignment and also their Motion to Remand.

3 Plaintiffs make much ado about what undoubtedly were procedural irregularities in the re-filing of this case in district court. These cases

may or may not have been mistakenly assigned to myself rather than Judge Williams, but all this is beside the point. Do not mistake me: the improper docketing and assignment of cases is a matter of no little consequence, and the court cannot remain impervious to evidence that nefarious motives adulterate the neutrality of the random case assignment system. But even if this court had the time, inclination, and resources to launch a full scale investigation, this would all still be not only beside the point, it would obscure the point, which is finding an appropriate forum for the prompt resolution of this dispute.

[*9] No, say Defendants, what you must do is send the cases to the MDL. The MDL, after all, found centralization of Flight 3379 cases in the Middle District of North Carolina "desirable" to avoid duplication of discovery, inconsistent pretrial rulings, and the unnecessary depletion of the resources of all parties involved. See 28 U.S.C. § 1407. Acting on this finding, the seven experienced judges of the MDL issued a conditional Transfer Order on 20 December 1995 transferring to Judge Richard C. Erwin in the Middle District of North Carolina those cases involving "common questions of fact concerning the cause or causes of the December 13, 1994 crash of American Eagle Flight 3379 near Morrisville, North Carolina." ⁴ Docket No. 1084, Conditional Transfer Order (CT0-2), Judicial Panel on Multidistrict litigation, *In re Air Crash Near Morrisville, North Carolina*, on December 13, 1994, filed 26 January 1996.

4 This specifically included the six cases before me now.

But is the MDL's authority to transfer these [*10] cases not impeded by the jurisdictional objections currently pending before me? No. See *In re Ivy*, 901 F.2d 7, 8-10 (2d Cir. 1990). The "sole issue" before the Ivy Court was "the merits of the transfer viewed against the purposes of the multidistrict statutory scheme, whether or not there is a pending jurisdictional objection." *Id.* at 9. After balancing these considerations, the Ivy Court upheld the MDL's "jurisdiction to transfer a case in which a jurisdictional objection is pending." See also *In re Federal Election Campaign Act Litigation*, 511 F. Supp. 821, 823-24 (J.P.M.L. 1979) (Panel transferred

actions despite pendency of motions to dismiss for lack of subject matter jurisdiction). Sending these cases to the MDL is not mandatory. But the benefits of transferring them to the MDL--the body established by Congress specifically to ameliorate the duplicative litigation and the valuable waste of judicial resources--are obvious: "Once transferred, the jurisdictional objections can be heard and resolved by a single court and reviewed at the appellate level in due course." *Id.* at 9. The rewards of this approach are consistency and economy.

This is where things [*11] stand at the moment with the cases before me: Defendants' brief in opposition to Plaintiffs' Motion to vacate the conditional transfer order is due to be filed on 14 March 1996 and the MDL Panel is expected to rule shortly thereafter. Judge Erwin, the MDL transferee judge, has postponed scheduling the first pretrial conference in the previously transferred cases until sometime prior to 1 June 1996 in order to give the MDL Panel an opportunity to rule on the transfer of these six additional cases.

Since the MDL will soon be looking at the forest as well as the trees, the best course is to postpone ruling on the present motions (damages discovery in these cases is ongoing, and will not be delayed, and no liability discovery has been taken) and allow the MDL panel to determine whether to make its conditional order final. If the cases are transferred, it is far better for Judge Erwin to resolve the jurisdictional question.

I therefore stay any ruling on the instant motions until the Panel rules on the transfer issue. See e.g., Stay Order entered by N.D. Texas in *Leech v. AMR Corp.*, et. al., No. 395-CV-2502-G. Hopefully, the MDL will be able to provide a fitting ending to the road [*12] tour of the long-running drama, "Six Cases in Search of a Forum." Prior to issuance of this opinion, I have tendered the draft to Judge Williams who has authorized me to say she concurs in this disposition.

Enter:

James B. Zagel

United States District Judge

Date: APR - 1 1996